

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

REGINALD GREEN

PETITIONER

VS.

NO. 3:98CV101-B

UNITED STATES OF AMERICA

DEFENDANT

ORDER

This cause comes before the court upon the petitioner's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. [1]. Upon due consideration, the court finds that the petitioner's motion is without merit and should be denied.

On January 28, 1994, the petitioner and three other defendants were indicted on eight collective counts. Count one charged the petitioner and the other three defendants with conspiracy to distribute and to possess with the intent to distribute in excess of 50 grams of cocaine, in violation of 21 U.S.C. §§841 and 846. Count two charged the petitioner with unlawfully engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848. Count six charged the petitioner with the use of a telephone to facilitate a conspiracy to distribute cocaine base in violation of 21 U.S.C. § 843. Counts three, four, five, seven and eight were charges against another defendant. Although the trial court dismissed counts three through eight, on March 16, 1995, the jury returned a verdict against the petitioner on counts one and two. On July 14, 1995, the petitioner was sentenced to 384 months confinement followed by supervised release for a term of five (5) years, a \$50,000 fine and a special assessment of \$50. After sentencing, the petitioner appealed to the Fifth Circuit Court of Appeals. The jury verdict was affirmed on December 31, 1996. The petitioner then filed a petition

for rehearing which was denied on January 31, 1997, and a petition for writ of certiorari which was thereafter denied. The petitioner has now moved for post conviction relief under 28 U.S.C. § 2255 asserting numerous issues for consideration.

Petitioner has, in his motion under § 2255, asserted grounds that were not raised on direct appeal. A movant is barred from raising constitutional claims for the first time on collateral review unless he demonstrates a cause for failing to raise the issue on direct appeal and actual prejudice resulting from error. United States v. Pierce, 959 F.2d 1297, 1301 (5th Cir. 1992), cert. denied, 506 U.S. 1007, 121 L. Ed. 2d 554 (1992); United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991), cert. denied, 502 U.S. 1076, 117 L. Ed. 2d 141 (1992). The cause and prejudice standard applies regardless of whether the petitioner pled guilty or was convicted by a jury. See, United States v. Segler, 37 F.3d 1131, 1133 (5th Cir. 1994); Williams v. United States, 805 F.2d 1301 (7th Cir. 1986), cert. denied, 481 U.S. 1039, 95 L. Ed. 2d 818 (1987). No other types of errors may be raised on collateral review unless the movant demonstrates that the error could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice. Pierce, 959 F.2d at 1301, Shaid, 937 F.2d at 232.

In filing his motion under § 2255, the petitioner further asserts that he has new evidence that witnesses who testified against him at trial in fact perjured their testimony and have now recanted their testimony at trial and have issued sworn statements tending to absolve the petitioner. The petitioner asserts that this new evidence entitles him to a hearing or even a new trial. “New trials based on newly discovered evidence are generally disfavored by the courts and are viewed with great caution.” United States v. Nixon, 881 F.2d 1305, 1311 (5th Cir. 1989). Further, “the recanting of prior testimony by a witness is ordinarily met with extreme skepticism.” Unites States v. Nixon, 881 F.2d at 1311. “It is one of the oldest established rules of Anglo-American Jurisprudence that the jury

is the arbiter of credibility of witnesses.” United States v. Cravero, 530 F. 2d. 666, 669 (5th Cir. 1976). The protections of our justice system rely upon a jury to evaluate the truth and veracity of a witness and does not allow a judge to seize this power upon a whim simply based on his assessment of a witness’ truthfulness. Cravero, 530 F. 2d. at 670 (citations omitted). The court, after careful review of the petitioner’s motion, supporting memoranda and exhibits, finds that the credibility of the witnesses at the petitioner’s trial who allegedly perjured themselves was properly determined by the jury, and the petitioner’s motion must be denied.

The petitioner further asserts as grounds for vacation of his sentence that he received ineffective assistance of counsel. The petitioner’s claim of ineffective assistance of counsel is properly raised for the first time in a §2255 motion rather than on direct appeal. United States v. Patten, 40 F.3d 774, 776 (5th Cir. 1994), cert. denied, 515 U.S. 1132, 132 L. Ed. 2d 811 (1995). In determining whether the petitioner was subjected to ineffective assistance of counsel, the court is guided by a two prong test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). Strickland requires that a petitioner establish: (1)that counsel’s performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that the deficient representation prejudiced the defense so much that the results of the proceeding would have been different. Strickland, 466 U.S. at 687-688, 80 L. Ed. 2d at 693-694. A petitioner’s failure to establish either prong of the test warrants rejection of the claim.

The petitioner’s main concern in his allegations of ineffective assistance of counsel appears to be that his trial counsel did not object to the quantity of crack or cocaine used in determining the petitioner’s base level offense. The petitioner asserts his beliefs regarding the allegedly incorrect computation of drug quantity, but fails to bring forth any evidence other than conclusory statements and allegations of any unprofessional or otherwise deficient conduct of the petitioner’s trial counsel.

The court finds that there is no evidence that petitioner was not ably represented by his counsel, Ms. Deborah Stanton Burke. The undersigned presided over the petitioner's trial and is of the opinion that the petitioner was very capably represented. The court has reviewed the petitioner's ineffective assistance of counsel claims and finds that the petitioner has failed to convince the court that his representation fell below an objective standard of reasonable professional service at any time or that the allegedly deficient representation prejudiced the defense so much that the results of the proceeding would have been different. Accordingly, the court finds no merit to the petitioner's claim of ineffective assistance of counsel.

The remainder of petitioner's claims must likewise be dismissed for failure to meet the cause and actual prejudice standard applied to claims asserted for the first time on collateral review. The court finds that the petitioner has failed to demonstrate sufficient cause for his failure to raise his claims on direct appeal, further, that the petitioner has failed to show that he suffered actual prejudice resulting from any error.

For the forgoing reasons, it is **ORDERED** that the petitioner's motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. § 2255 [1] is **DENIED**.

THIS, the ____ day of August, 1999.

NEAL B. BIGGERS, JR.
CHIEF JUDGE